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## Memorandum in Opposition to Defendant's Motion to Exclude Experts Chapman, Wilson, and Chakraborty

Terry H. Gilbert  
*Attorney for Sheppard Estate*

George H. Carr  
*Attorney for Sheppard Estate*

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ALAN J. DAVIS, Special Administrator )  
of the Estate of )  
SAMUEL H. SHEPPARD )

Plaintiff )

vs. )

STATE OF OHIO )

Defendant )

Judge Ronald Suster

Case No. 312322

**MEMORANDUM IN**  
**OPPOSITION TO DEFENDANT’S**  
**MOTION TO EXCLUDE EXPERTS**  
**CHAPMAN, WILSON, AND**  
**CHAKRABORTY**

Plaintiff, by and through undersigned counsel, hereby submits the attached memorandum in opposition to the State's Motion to Exclude experts Wilson, Chapman, and Chakraborty, filed on or about December 3, 1999. The reasons and authorities for denying the State's Motion are set forth in the attached Memorandum, which is hereby incorporated herein.

Respectfully submitted,

Terry H. Gilbert (0021948)

George H. Carr (0069372)

Friedman &amp; Gilbert

1700 Standard Building

1370 Ontario Street

Cleveland, OH 44113

(216) 241-1430

**Attorneys for Plaintiff**

## **Memorandum in Opposition**

### **I. Introduction**

Based on pretrial conferences held early in 1999, this Court issued a case management order on February 16, 1999, that required witness lists from the parties in April 1999, and set a cutoff for Plaintiff's submission of expert reports of May 3, 1999. On Plaintiff's oral motion, this deadline was extended until August 5, 1999, and after this Court granted the State's motion for continuance of trial, the State moved to require Plaintiff to supplement its expert reports. This motion was denied, and the State was ordered to produce its expert reports on or before December 1, 1999. Plaintiff has listed three expert witnesses intended to testify at trial, and the State now seeks to prevent their testimony, based on the expiration of the May 3 deadline. Amazingly, the State's motion requesting the exclusion of expert testimony based on failure to comply with the case management order comes in spite of the State's failure, at the time of this writing, to produce written reports for nine (9) of its sixteen (16) named experts. The State's motion should be denied, for the following reasons.

### **II. Professor James Chapman**

In witness lists since April 1999, Plaintiff has listed Professor James Chapman, a criminologist from New York, as an expert witness. However, Plaintiff has not yet been able to provide an expert report from Professor Chapman, as Professor Chapman has been unable to complete his review of the case. As litigation has progressed, Professor Chapman has insisted to Plaintiff's counsel his need to review all surviving police and forensic reports prior to rendering any expert opinions. To that end, Plaintiff's counsel continued to demand—and receive—additional documentation and discovery from the State. However, once it became apparent that Professor Chapman would be unable to complete his review of the case without

access to the original files of the police and Coroner, Plaintiff's counsel requested that this Court devise a solution to the document-access problem plaguing not only Professor Chapman's preparation, but also other aspects of Plaintiff's investigation. To that end, this Court ordered that the State set aside a document room in the Cuyahoga County Prosecutor's Office, where Plaintiff's counsel and agents could review the voluminous historical documents in the case at leisure. Subsequent to this Order, the State discovered the transcript of Dr. Sheppard's 1966 trial, and made it available to Plaintiff for the first time. After access to the 'Sheppard room' was finally gained on November 22, 1999, Professor Chapman was able to complete his review of the surviving reports, documents, and transcripts, and is now preparing a report summarizing the conclusions he has drawn from them.

Plaintiff should not be penalized for failing to comply with the Case Management Order when the materials necessary to the formation of an expert's opinion are in exclusive possession and control of an opposing party, and the expert report deadline passes before access to the documents are granted. Adoption of such a policy would improperly reward litigants who fail to comply with discovery demands until the passage of an expert report deadline for an opposing party.

In fact, the Local Rules provide for just such an occasion by allowing additional time for the submission of expert reports "for good cause shown." Local Rule 21.1, Part I(A). Exclusive control and access to documents by an opposing party must constitute "good cause" for the purposes of this rule. Therefore, Professor Chapman's testimony should be permitted.

### III. John Wilson

Plaintiff has retained John Wilson for four reasons. First, after receipt of reports from State's proposed expert witnesses Phillip Bouffard and Albert Lyter, Plaintiff learned that the

State intended to introduce evidence tending to show that Dr. Sam Sheppard signed a copy of his autobiography, *Endure and Conquer*, with a caption allegedly admitting the murder of his wife, Marilyn Sheppard. Second, in pretrial conference with this Court, counsel for the State gave notice that it intended to introduce evidence of Dr. Sam Sheppard's character and other acts following his release from prison in 1964. Third, after receipt of the report of Gregg McCrary, the State's purported expert witness in criminalistics, it received notice that the State intended to introduce evidence that Dr. Sheppard "staged" one or more crimes, and otherwise altered the scene prior to contacting authorities. Fourth, in its Pretrial Statement, filed December 14, 1999, the State characterizes Dr. Sheppard's statements following the events of July 4, 1954 as "vague" and "contradictory," announcing its intention to portray these statements as deceitful.

Based on these issues raised by the State, Wilson is expected to testify as to whether Dr. Sheppard suffered from post-traumatic stress disorder (PTSD) following the events of July 4, 1954 and thereafter. Plaintiff is entitled to introduce expert testimony on this issue, and had no obligation to produce a written expert report on this issue until receipt from the State of the documents and statements described above; therefore, Plaintiff's failure to submit an expert report before the May 3, 1999 deadline does not violate the Case Management Order.

#### IV. Dr. Rajit Chakraborty

Recently, Plaintiff received the report of Plaintiff's proposed expert witness, Mitchell Holland, who gives several opinions outside the area of his expertise, e.g., that Dr. Tahir's identification of DNA evidence was legally inadmissible without "some means to convey the weight of the typing results." Despite the fact that this opinion relates to the practice of law and the scientific field of population genetics, neither of which are Dr. Holland's expertise, Plaintiff nonetheless contacted Dr. Tahir to obtain a supplemental report regarding this issue, but as this

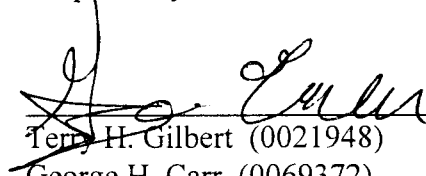
issue is also outside Dr. Tahir's field of expertise, Plaintiff's counsel was directed to Dr. Rajit Chakraborty, who agreed to examine Dr. Tahir's results and provide statistical analysis in the field of population genetics.

As with James Wilson, Dr. Chakraborty is expected to testify only in opposition or agreement with an issue raised for the first time by the State. Therefore, Dr. Chakraborty's failure to submit a written expert report prior to May 3, 1999 does not violate the Case Management Order.

V. Conclusion

For the reasons stated herein, Plaintiff requests that this Court deny the State's motion to exclude the testimony of Plaintiff's proposed expert witnesses.

Respectfully submitted,

The block contains two handwritten signatures in black ink. The first signature is for Terry H. Gilbert, and the second is for George H. Carr. Both signatures are written in a cursive, flowing style.

Terry H. Gilbert (0021948)

George H. Carr (0069372)

Friedman & Gilbert

1700 Standard Building

1370 Ontario Street

Cleveland, OH 44113

(216) 241-1430

*Attorneys for Plaintiff*

**Certificate of Service**

The undersigned certifies that the foregoing Memorandum in Opposition to Defendant's Motion to Exclude Experts Chapman, Wilson, and Chakraborty has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 15<sup>th</sup> day of December, 1999.

  
George H. Carr (0069372)  
*Attorney for Plaintiff*